

(1987) 09 MAD CK 0026
In the Madras High Court

Province of Madras

APPELLANT

Vs

Jaithoon Bibi and Others

RESPONDENT

Date of Decision : 15-09-1987

Acts Referred:

Citation : (1988) ACJ 855 : (1988) 1 LW 378 : (1988) 1 MLJ 80

Hon'ble Judges : S.A. Kader, J

Bench : Division Bench

Judgement

S.A. Kader, J.—This appeal is against the judgment and decree of the Subordinate Judge of Madurai in O.S. 331 of 1971. The 1st

defendant-State of Tamil Nadu is the appellant.

2. This is a suit for damages. The 1st defendant is the State of Tamil Nadu represented by the Collector of Madurai. The 2nd defendant is the

Assistant Engineer and the 3rd defendant is the Junior Engineer, serving under the 1st defendant. The 4th defendant is the Contractor. It may be

mentioned here and now that defendants 2 to 4 have been impleaded subsequently. The plaintiff is the owner of the property bearing door No. 25,

Obla Kobla Padithurai Road in T.S. No. 1215 in Ward No. 4 in Madurai Town. Immediately north of the plaintiff's property runs the Panaiyur

irrigation channel. The northern wall of the plaintiff's property abutting the channel is a pucca one constructed with rubble stones, cement and lime

mortar to prevent erosion by the waters of the channel. The 1st defendant started construction of a regulator and other masonry structures in the

said channel north of the plaintiff's northern boundary wall. The construction operations were carried on by the 4th defendant as the Contractor

under the immediate supervision of defendants 2 and 3. Due to the haphazard

and negligent manner in which the digging operations were done by the 4th defendant for putting up the basement for the regulator on 10.8.1968 the plaintiff's northern wall lost its lateral and vertical support and fell down to a length of 33-1/2 feet and a height of 26-1/2 feet. The remaining portion of the wall developed cracks. On 12.8.1968, the plaintiff issued a notice to the 4th defendant calling upon him to restore the plaintiff's wall to its original condition. Defendants 2 and 3 inspected the site and agreed to restore the wall at the cost of the Government. At the instance of the 2nd defendant, the 3rd defendant suggested to the plaintiff's power-of-attorney agent that the restoration of the wall might be done at the expense of the plaintiff herself in the first instance and the amount would be paid by the Government. He gave two letters calculating the rates for the different items of work to be carried out and for the cost of materials and labour. The plaintiff carried out the construction of the wall and completed it at a cost of Rs. 11736-73. She then sent a report on 24.11.1969 to the defendants 2 and 3 requesting payment. There was no response-Consequently, the plaintiff issued a notice u/s 80 of the CPC to the 1st defendant with copies to defendants 2 and 3 claiming payment with interest at 6 per cent per annum. As the plaintiff's claim has been rejected, the plaintiff is constrained to institute this suit.

3. The 1st defendant raised the following contentions:

It is admitted that the work of construction of head sluice in Panaiyur channel was entrusted to the 4th defendant and the work was carried out only within the limits of the Panaiyur channel. This defendant is not aware of the alleged damage caused to the plaintiff's wall. It is denied that the digging operations were made in a haphazard or negligent manner without taking necessary precautions. It is also denied that a portion of the plaintiff's wall fell on 10.8.1968 or the remaining portions suffered cracks. It is further denied that defendants 2 and 3 inspected the site and agreed to restore the wall and asked the plaintiff to do the work promising reimbursement. Defendants 2 and 3 had no such authority or competency. It is not admitted that the plaintiff put up the construction of the wall and expended a sum of Rs. 11,736-73. The plaintiff is not entitled to claim that amount or any portion thereof from this defendant. She has to seek her remedy only against the 4th defendant. The notice issued by the plaintiff

was rejected after due examination.

4. The 2nd defendant was set ex parte.

5. The 3rd defendant claimed that he was neither a necessary nor a proper party in his individual capacity. He admitted having given a letter to the

plaintiff in his capacity as Junior Engineer, and he did so only on the instructions of the 2nd defendant his immediate superior. According to him, the

foundation of the plaintiff's wall was not confined to his property but projected into the Panaiyur channel poromboke. The wall was damaged only

to a length of 19 feet. The height of the wall was not 26 feet. The 4th defendant was entrusted with the work as per agreement. This defendant has

not exceeded his power in giving the letters to the plaintiff. They only mention the rates and charges. The cost of reconstruction of the wall will not

come to Rs. 11,000 and odd. It will be only about Rs. 600. The 4th defendant alone, in any event, is liable. The suit was also impugned as barred

by time.

6. The contentions of the 4th defendant are as follows:

This defendant is an approved contractor and was assigned the work of putting up a wall and a regulator near the plaintiff's wall in Panaiyur

channel. The regulator was put up to a width of 5 feet and length of 15 feet touching the plaintiff's Wall. The work was supervised by defendants 2

and 3. The plaintiff's wall appeared to be an encroachment on the river poromboke. This defendant took all precautionary measures and the

damage caused to the plaintiff's wall was not due to the negligence of the 4th defendant. In any event, the 1st defendant alone is liable. The

measurements given by the plaintiff are not correct. The cost of re-construction of the plaintiff's wall would come only to Rs. 100. The claim for

damages is exaggerated. The suit is also barred by limitation.

7. The learned Subordinate Judge held that the plaintiff's northern wall measuring 33-1/2 feet long, 25 feet high and 1-1/2 feet thick fell down on

10.8.1968 due to the negligence of the 4th defendant carrying out the construction work in Panaiyur channel and that the plaintiff would not be

entitled to claim anything more than Rs. 2,000. The Court below also held that defendants 2 to 4 were not liable for the damages and that the claim

against them was barred by time as they were impleaded as parties only on 14.7.1977. It was further held that the letter given by the 3rd defendant

is binding on the Government and the Government are therefore liable to pay the damage of Rs. 2,000 to the plaintiff. The plea of immunity on the ground of exercise of sovereign functions claimed by the 1st defendant was rejected, and in the result, the suit was decreed directing the 1st defendant to pay a sum of Rs. 2,000 with proportionate costs to the plaintiff with interest thereon at 6 per cent per annum from the date of plaint till realisation. The suit was dismissed as against defendants 2 to 4. Aggrieved by the decree, the 1st defendant has come in appeal. The plaintiff has not filed any cross-objection or cross-appeal against defendants 2 to 4.

8. The only point that arises for determination is whether the the appellant-1st defendant State of Tamil Nadu is liable for the damages claimed and awarded?

9. Point: The Panaiyur channel is an irrigation channel constructed and maintained by the State. The construction of the regulator and other masonry structures were carried on in the said channel by the State through its contractor, the fourth defendant. Due to the negligence of the fourth defendant in carrying out the digging operations, the northern wall of the plaintiff's house adjacent to the channel collapsed and the loss sustained by the plaintiff has been estimated by the court below at Rs. 2,000. One of the grounds on which the learned Subordinate Judge has found the State liable for the claim is that the letter given by the third defendant-Junior Engineer under the directions of the second defendant-Assistant Engineer accepting the liability of the Government is binding on the Government. It does not admit of any doubt that neither the second defendant nor the third defendant had any such authority to bind the Government by his letter. The claim cannot, therefore, be sustained on the basis of such a letter.

10. The main question of law which arises in this appeal is, whether the appellant-State of Tamil Nadu is liable to compensate the plaintiff for the tortious act of the fourth respondent-contractor employed by the State for carrying out certain works in the Panaiyur Irrigation channel. The activities of the State may broadly be classified into three categories viz., (1) Acts of State, pure and simple such as waging war and making peace, annexation of territories and cession of territories, entering into treaties with foreign powers etc.

(2) Sovereign or Governmental acts of the State such as the maintenance of law and order, search and seizure of properties and arrest of a person

in the course of a criminal investigation, the making and maintenance of highway roads civil and military etc; and

(3) Non-sovereign or non-Governmental acts of the State such as the running of railways, airways and roadways and the carrying of commercial activities.

In respect of category 1, it is settled law that the Municipal Courts of the country have no jurisdiction to deal with such matters. As regards

category 2, it is now well established that the State is not liable for tortious acts of its servants committed in the course of the execution of such

works. In respect of the last category, the State is liable as much as a private individual. The essential distinction between categories 2 and 3 lies in

the fact that in the former the acts are done in the exercise of Governmental powers which cannot lawfully be done except under sovereign

authority or delegation thereunder while in the latter the acts are done in pursuance of ventures, which even the private individual may as well

undertake, for example mercantile operations. The classic statement of law on the subject is that of the Chief Justice Peacock of the Supreme

Court of Calcutta in the Full Bench decision in the well-known *Peninsular and Oriental Steam Navigation Co. v. Secretary of State for India* in

Council (1868) 5 Bom. H.C.R. App. A1. The law was thus stated by the learned Chief Justice:

There is a great and clear distinction between the acts done in the exercise of what are usually termed sovereign powers and acts done in the

conduct of undertakings which might be carried on by private individuals without having such powers delegated to them.... Where an act is done,

or a contract is entered into, in the exercise of powers usually called sovereign powers by which we mean powers which cannot be lawfully

exercised except by sovereign, or private individual delegated by a sovereign to exercise them, no action will lie.

11. In *Kasturilal Ralia Ram Jain Vs. State of Uttar Pradesh*, , a five-Judge Bench of the Supreme Court of India had occasion to consider the

liability of the State for the negligence of its Police Officers in dealing with the large items of jewellery seized from the plaintiff's partner Mr. Ralia

Ram and which was subsequently lost by misappropriation. After reviewing all the authorities on the subject, the Supreme Court observed:

It is not difficult to realize the significance and importance of making such a distinction particularly at the present time when, in pursuit of their

welfare ideal, the Government of the State as well as the Government of India naturally and legitimately enter into many commercial and other

undertakings and activities which have no relation with the traditional concept of Governmental activities in which the exercise of sovereign power

is involved. It is necessary to limit the area of these affairs of the State in relation to the exercise of sovereign power, so that if acts are committed

by Governmental employees in relation to other activities which may be conveniently described as non-Governmental or non-sovereign, citizens

who have a cause of action for damages should not be precluded from making their claims against the State.

...

In the present case, the act of negligence was committed by the police officer while dealing with the property of Ralia Ram which they had seized in

exercise of their statutory powers. Now, the power to arrest a person, to search him, and to seize property found with him, are powers conferred

on the specified officers by statute and in the last analysis, they are powers which can be properly characterised as sovereign powers; and so, there

is no difficulty in holding that the act which gave rise to the present claim for damages has been committed by the employee of the respondent

during the course of its employment; but the employment in question being of the category which can claim the special characteristic of sovereign

power the claim cannot be sustained; and now we inevitably hark back to what Chief Justice Peacock decided in 1861 and held that the present

claim is not maintainable?

12. In the Highways Department of South Arcot Represented by the Collector of South Arcot v. Vedanthachari and Ors. (1972) 1 M.L.J. 71 :

AIR 1972 Mad. 148, a Bench of this Court had to deal with the liability of the Highways Department of the State Government for damages on

account of the death of the plaintiff's son in the accident that took place in the Vridhachalam-Cuddalore Road due to the culvert giving way and

the bus plunging into the channel. The learned Judges have held that no action

would lie against the State in respect of the acts done by them in exercise of the sovereign powers like the maintenance of Highways.

13. The question which directly arises for consideration is, whether the construction and maintenance of the irrigation channel is one of the sovereign functions of the State. The learned Subordinate Judge has relied upon the judgment of a single Judge of the Bombay High Court in State

of Mysore Vs. Ramchandra Gunda and Another, , in holding that the construction of sluice in the Panaiyur channel must only be an act of the

Welfare State. In the aforesaid decision the learned Judge held that the construction of the reservoir by the State for facilitating the supply of

drinking water to the citizens could at best be considered as welfare act, but certainly not an act of the State Government in its capacity as a

sovereign State. For, according to the learned Judge. ""It was not an act which the State Government had to commit as it was obliged to do"". With

due deference to the learned Judge I am unable to agree with this view. The question is not whether the State is obliged to do the particular act or

not but whether the act is one which could be done by private individuals, without delegation to them of the sovereign powers of the State. In a

predominantly agricultural country like India, the harnessing of river water, the construction of reservoirs and irrigation channels throughout the

length and breadth of the country on which depends the national economy are the sovereign functions of the State and no individual or group of

individuals can embark upon such a programme without the delegation to them of what we call the sovereign powers of the State. I hold, therefore,

that the maintenance of the Panaiyur Irrigation channel is the sovereign function of the State and the fourth defendant-contractor in carrying out the

work in the said channel was exercising the delegated sovereign powers of the State and as such, the State Government is not liable for the tortious

act committed by the contractor. The point is found accordingly.

14. In the result, the appeal is allowed, the judgment and decree of the court below are set aside and the suit is dismissed, but, without costs

throughout.